

STATE OF MICHIGAN
COURT OF APPEALS

SHANAFAN, L.L.C.,

Plaintiff-Appellant,

v

CYNTHIA VANRENTERGHEM, DANIEL
DEJONGE, ELIZABETH DEJONGE, DAVID
VELDINK, MARY VELDINK, JACK VOS,
DAWN VOS, LAURA VOS, JON VOS,
KIMBERLY STUK, and JEFFREY STUK,

Defendants-Appellees.

UNPUBLISHED

April 26, 2011

No. 294923

Kent Circuit Court

LC No. 08-001903-CK

Before: SHAPIRO, P.J., and FITZGERALD and BORRELLO, JJ.

PER CURIAM.

Plaintiff appeals as of right, challenging the trial court's orders dismissing with prejudice her various claims against defendants pursuant to MCR 2.116(C)(8) and (C)(10) and denying her motion for an extension of time to file a second amended complaint. We affirm.

In June 2005, plaintiff's predecessor signed a franchise agreement with Greater Leap of Faith, Inc. ("GLOF"), to operate a franchise of a business known as Main Dish Kitchen. The business concept of Main Dish Kitchen was that customers would come to the facility and assemble meals to take home to either eat or freeze. The franchise was unsuccessful and GLOF eventually went out of business. Plaintiff later filed an arbitration claim against GLOF for breach of the franchise agreement. Plaintiff also filed this separate circuit court action against 11 shareholders of GLOF, who also served as officers and directors of the company.

Plaintiff's initial complaint did not identify any separate counts or causes of action and did not specify which allegations applied to which defendants. The trial court granted defendants' motion for a more definite statement and directed plaintiff to file an amended complaint "that includes enumerated counts specifying Plaintiff's causes of action, a recitation of the facts supporting each count, and identification of which count(s) applies to each individual defendant to the best of Plaintiff's knowledge."

Plaintiff filed an amended complaint alleging ten separate counts. Defendants moved for summary disposition of all counts under MCR 2.116(C)(8), arguing that plaintiff's claims, as alleged, were too vague and conclusory and devoid of factual detail to sufficiently state a claim

for relief. The trial court denied defendants' motion with respect to count II (civil conspiracy), count VI (piercing the corporate veil), and count VIII (violation of Michigan's franchise investment law), finding that those claims were sufficiently stated. The court granted the motion with respect to count V, concluding that Michigan does not recognize a cause of action for breach of an implied contractual covenant of good faith and fair dealing. Lastly, the court conditionally denied defendants' motion with respect to count I (breach of fiduciary duty), count III (tortious interference with a contract), count IV (tortious interference with business relationships), count VII (fraud and misrepresentation), count IX (violation of Michigan's Business Corporation Act), and count X (embezzlement and conversion). The court concluded that these latter six counts, as alleged, failed to state claims for relief, but ruled that plaintiff would be permitted to file a second amended complaint within 21 days.

Plaintiff failed to file a second amended complaint within the time permitted and, thereafter, moved to extend the time period for filing a second amended complaint, which the trial court denied. Further, because plaintiff had not filed a second amended complaint, the trial court dismissed counts I, III, IV, VII, IX, and X pursuant to MCR 2.116(C)(8).

Defendants later moved for summary disposition of plaintiff's remaining three counts pursuant to MCR 2.116(C)(10) and submitted documentary evidence in support of their motion. Although the discovery period had not expired, defendants had been deposed by this time. Plaintiff opposed defendants' motion, arguing generally that summary disposition was premature because discovery had not been completed and there were genuine issues of fact that precluded summary disposition. However, plaintiff did not submit any documentary evidence or cite any facts from defendants' depositions in support of its claims. The trial court disagreed with plaintiff and dismissed plaintiff's remaining claims for civil conspiracy, piercing the corporate veil, and violation of Michigan's franchise investment law pursuant to MCR 2.116(C)(10). This appeal followed.

I. MOTION TO EXTEND TIME FOR FILING A SECOND AMENDED COMPLAINT

Plaintiff first argues that the trial court erred in denying its motion to extend the time to file a second amended complaint until the close of discovery. Plaintiff also argues that the trial court erred in dismissing counts I, III, IV, VII, IX, and X pursuant to MCR 2.116(C)(8), before discovery was concluded. We disagree.

We review the trial court's decision on plaintiff's request for an extension for an abuse of discretion. Cf. *Soumis v Soumis*, 218 Mich App 27, 32; 553 NW2d 619 (1996). We also review a ruling on discovery matters for an abuse of discretion. *VanVorous v Burmeister*, 262 Mich App 467, 476; 687 NW2d 132 (2004). An abuse of discretion occurs only when the trial court's decision falls outside the range of reasonable and principled outcomes. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006).

As noted by plaintiff, leave to amend a complaint "shall be freely given when justice so requires." MCR 2.118(A)(2); see also *Ben P Fyke & Sons v Gunter Co*, 390 Mich 649, 659; 213 NW2d 134 (1973). However, this case does not involve a denial of a motion to amend. Indeed, the trial court expressly permitted plaintiff to amend its complaint. Thus, plaintiff's reliance on cases addressing the amendment of pleadings is misplaced. Instead, the issue presented here is

whether the trial court should have granted plaintiff's request for an extension of time to file a second amended complaint after plaintiff failed to file one within the 21-day time period permitted by the trial court.

The trial court had discretion to extend the time period for filing a second amended complaint. MCR 2.108(E). Here, plaintiff argues that its motion for an extension should have been granted because discovery had not been completed and summary disposition would therefore be premature.

In this case, the trial court had already permitted plaintiff to file a first amended complaint because of deficiencies in the original complaint and then again permitted plaintiff to file a second amended complaint because of continuing deficiencies with several of the claims in the first amended complaint. Plaintiff did not file a second amended complaint within the time permitted and did not file its motion for an extension of time to file a second amended complaint until after the time period for filing the amendment had already expired. Further, plaintiff relied on the fact that discovery had not been completed to justify its request for an extension of time. Although summary disposition may be premature if discovery has not been completed, that rule generally applies to motions for summary disposition under MCR 2.116(C)(10), because discovery may establish factual support for a party's claim. See *VanVorous*, 262 Mich App at 476-477. Here, the purpose of the amendment was to cure legal deficiencies in plaintiff's first amended complaint so as to preclude summary disposition of various claims under MCR 2.116(C)(8). Although discovery might be useful to determine whether plaintiff could factually support any properly alleged claims, it was not necessary to enable plaintiff to sufficiently allege a cognizable claim for relief in the first instance.

Further, even in the context of a motion under MCR 2.116(C)(10), "a party opposing a motion for summary disposition because discovery was not complete must provide some independent evidence that a factual dispute exists." *Mich Nat'l Bank v Metro Institutional Food Serv, Inc*, 198 Mich App 236, 241; 497 NW2d 225 (1993); see also *Davis v Detroit*, 269 Mich App 376, 379-380; 711 NW2d 462 (2006). Here, plaintiff failed to offer even minimal evidence to support its claims of liability. This failure is even more damaging to plaintiff's position given that plaintiff had already taken defendants' depositions, but failed to cite any testimony from those depositions in support of its claims.¹

Under these circumstances, the trial court did not abuse its discretion in denying plaintiff's motion for an extension of time to file a second amended complaint until the close of discovery.

¹ Plaintiff alleges that the depositions were not taken in time, as they were delayed until January 14 and 15, 2009, and its amendment was due January 20, 2009. However, plaintiff provides no explanation as to why its request for an extension was not made prior to January 20 when it became clear that the depositions were not going to be completed until shortly before the deadline.

II. SUMMARY DISPOSITION UNDER MCR 2.116(C)(8)

Plaintiff next argues that the trial court erred in dismissing counts I, III, IV, VII, IX, and X of its first amended complaint pursuant to MCR 2.116(C)(8), for failure to state a claim on which relief could be granted. We disagree.

A trial court's decision on a motion for summary disposition is reviewed de novo. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). A motion under MCR 2.116(C)(8) tests the legal sufficiency of a claim by the pleadings alone. *Id.* at 119; *Stopera v DiMarco*, 218 Mich App 565, 567; 554 NW2d 379 (1996). "All well-pleaded factual allegations are accepted as true and construed in a light most favorable to the nonmovant." *Maiden*, 461 Mich at 119. "A motion under MCR 2.116(C)(8) may be granted only where the claims alleged are so clearly unenforceable as a matter of law that no factual development could possibly justify recovery." *Id.* (citation and internal quotations omitted).

In this case, we agree with the trial court that counts I, III, IV, VII, IX, and X of plaintiff's first amended complaint failed to sufficiently state claims for relief. As explained in *Dalley v Dykema Gossett, PLLC*, 287 Mich App 296, 305; 788 NW2d 679 (2010), when reviewing a circuit court's dismissal under (C)(8):

Well-established principles guide our review. A complaint must contain "[a] statement of the facts, without repetition, on which the pleader relies in stating the cause of action, with the specific allegations necessary reasonably to inform the adverse party of the nature of the claims the adverse party is called on to defend" MCR 2.111(B)(1). "[T]he primary function of a pleading in Michigan is to give notice of the nature of the claim or defense sufficient to permit the opposite party to take a responsive position." [Citations omitted.]

Thus, contrary to what plaintiff argues, it was proper for the trial court to consider the vague and conclusory nature of plaintiff's allegations in determining whether summary disposition was warranted under MCR 2.116(C)(8).

The trial court dismissed count I of plaintiff's first amended complaint (breach of fiduciary duty) for failure to alleged facts supporting the existence of a fiduciary relationship between plaintiff and defendants. Plaintiff observes that directors of a corporation owe a fiduciary duty to the corporation and its creditors. See *Vesser v Robinson Hotel Co*, 275 Mich 133, 137; 266 NW 54 (1936). Although plaintiff repeatedly asserts that it is a creditor of GLOF, count I of the amended complaint does not allege that plaintiff is GLOF's creditor and the amended complaint advances no other basis for finding that a fiduciary relationship existed. Accordingly, the trial court did not err in dismissing count I pursuant to MCR 2.116(C)(8).

The trial court dismissed count III for failure to allege specific facts in support of plaintiff's claim for tortious interference with a contract. The basis for this claim was defendants' alleged interference with plaintiff's franchise agreement with GLOF by inducing other franchisees to terminate their franchise agreements. However, defendants were agents of GLOF, a contracting party. A defendant in a tortious interference claim must be a "third party" to the contract, not an agent of one of the contracting parties, unless the defendant was acting

solely for his or her own benefit. *Reed v Mich Metro Girl Scout Council*, 201 Mich App 10, 13; 506 NW2d 231 (1993); see also *Lawsuit Fin, LLC v Curry*, 261 Mich App 579, 593; 683 NW2d 233 (2004). The only specific allegation of personal benefit in plaintiff's first amended complaint is that "the acts of Defendants were for their own personal gain in that they did not have to invest personal funds into GLOF to fund certain programs and expenses." We agree with the trial court that this allegation, by itself, is insufficient to allege that defendants acted for their own personal benefit (rather than as agents of the corporation) because plaintiff failed to allege that defendants had any duty to personally fund any of GLOF's programs and expenses. Accordingly, the trial court did not err in dismissing count III pursuant to MCR 2.116(C)(8).

In count IV, tortious interference with a business relationship, plaintiff failed to allege that defendants personally benefited from their alleged interference with plaintiff's business relationship with other franchisees. Plaintiff also alleged that defendants interfered with its business relationships with "food and product suppliers," but aside from Gordon Foods, plaintiff failed to identify any food or product supplier whose relationship was affected even though plaintiff necessarily would have had knowledge of the identity of its own vendors. Plaintiff also failed to sufficiently allege that it suffered damages, given that there was no franchise to use the services of food and product suppliers such as Gordon Foods. For these reasons, the trial court did not err in dismissing count IV under MCR 2.116(C)(8). See *Mino v Clio Sch Dist*, 255 Mich App 60, 78; 661 NW2d 586 (2003) (setting forth the elements of a claim for tortious interference with a business relationship).

Count VII of plaintiff's first amended complaint (fraud, misrepresentation and innocent misrepresentation) alleges generally that numerous misrepresentations were made concerning various matters, but plaintiff did not allege anything specific that was said, by whom, or to whom, even though this information would necessarily have been within the knowledge of plaintiff's principals, Lisa and Joseph Guertin. Claims for fraud and misrepresentation must be pleaded with specificity. See MCR 2.112(B)(1); *Cooper v Auto Club Ins Ass'n*, 481 Mich 399, 414; 751 NW2d 443 (2008). The trial court did not err in finding that plaintiff's vague and unspecified allegations of fraud failed to state a claim on which relief could be granted.

With respect to count IX (violation of the Michigan Business Corporation Act), plaintiff cites MCL 450.1551, which provides that a corporation's directors may be liable to the corporation's creditors for certain specified acts. However, count IX of plaintiff's complaint does not allege that it is a creditor of GLOF. Thus, the trial court did not err in dismissing count IX pursuant to MCR 2.116(C)(8).

Lastly, plaintiff has abandoned any claim that count X (embezzlement, misappropriation and conversion) was improperly dismissed by failing to sufficiently brief its contention that the trial court erred in dismissing count X. *Etefia v Credit Technologies, Inc*, 245 Mich App 466, 471; 628 NW2d 577 (2001). "A party may not merely announce a position and leave it to the Court of Appeals to discover and rationalize the basis for the claim." *Joerger v Gordon Food Service, Inc*, 224 Mich App 167, 178; 568 NW2d 365 (1997).

For these reasons, we affirm the trial court's dismissal of counts I, III, IV, VII, IX, and X of plaintiff's first amended complaint pursuant to MCR 2.116(C)(8).

III. SUMMARY DISPOSITION UNDER MCR 2.116(C)(10)

Plaintiff challenges the trial court's dismissal of counts II, VI, and VIII, pursuant to MCR 2.116(C)(10).

A motion under MCR 2.116(C)(10) tests the factual sufficiency of a claim. Summary disposition may be granted under MCR 2.116(C)(10) when "there is no genuine issue of material fact, and the moving party is entitled to judgment . . . as a matter of law."

Because defendants submitted evidence in support of their motion under MCR 2.116(C)(10), plaintiff, as the nonmoving party, had the burden of establishing through affidavits, depositions, admissions, or other documentary evidence that a genuine issue of disputed material fact existed for trial. *Quinto v Cross & Peters Co*, 451 Mich 358, 361-362; 547 NW2d 314 (1996). Plaintiff could not simply rest on the allegations in its pleadings, but rather had an obligation to come forward with evidence of specific facts to establish the existence of a material factual dispute. *Id.* at 362, 371. Mere conclusory allegations devoid of factual detail are insufficient to show that a question of material fact exists. *Willis v Deerfield Twp*, 257 Mich App 541, 550; 669 NW2d 279 (2003).

With respect to count VIII, plaintiff alleged that defendants violated Michigan's franchise investment law by making various false statements to induce it to enter into the franchise agreement with GLOF. See MCL 445.1505. The only allegedly fraudulent statements identified in the depositions of plaintiff's principals, Lisa and Joseph Guertin, were a statement by defendant Dave Veldink that food costs would be low because he used to work for a major food wholesaler and knew how to negotiate the best discounts, and a statement by defendant Elizabeth DeJonge that "there is great potential to make at least six figures." However, plaintiff failed to present any evidence showing that these statements were not true and, therefore, failed to establish support for its franchise investment law claim. Furthermore, Veldink's statement was largely one of opinion and perhaps sales puffery and his reference to food discounts concerned future events. Similarly, DeJonge's statement was an expression of opinion, sales puffery, and likewise concerned future events. As a matter of law, such statements cannot support a claim of fraud. See *Hi-Way Motor Co v Int'l Harvester Co*, 398 Mich 330, 336; 247 NW2d 813 (1976); *Van Tassel v McDonald Corp*, 159 Mich App 745, 750; 407 NW2d 6 (1987). Although plaintiff generally asserts that other fraudulent statements were also made to induce it to enter into the franchise agreement, it did not present any evidence of other statements. For these reasons, the trial court properly dismissed count VIII pursuant to MCR 2.116(C)(10).

Count II asserted a claim for civil conspiracy. "A claim of civil conspiracy must be based on an underlying actionable tort." *The Mable Cleary Trust v The Edward-Marlah Muzyl Trust*, 262 Mich App 485, 507; 686 NW2d 770 (2004). Because all other underlying tort claims were properly dismissed, the civil conspiracy claim was also properly dismissed.

Count VI, piercing the corporate veil, also required a showing that defendants used the corporate form to commit a fraud or wrong. See *Foodland Distrib v Al-Naimi*, 220 Mich App 453, 456-457; 559 NW2d 379 (1996). Because plaintiff's franchise investment law claim was properly dismissed, and plaintiff failed to submit any evidence in support of its allegation that

defendants committed numerous other wrongs that could support counts II or VI, the trial court properly dismissed that claim as well.

For these reasons, we affirm the trial court's dismissal of counts II, VI, and VIII of plaintiff's first amended complaint pursuant to MCR 2.116(C)(10).

IV. IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING

Plaintiff argues that the trial court erred in dismissing its claim for violation of the implied covenant of good faith and fair dealing. We disagree.

As plaintiff concedes, unlike other jurisdictions, "Michigan does not recognize a cause of action for breach of the implied covenant of good faith and fair dealing." *Fodale v Waste Mgt of Mich, Inc*, 271 Mich App 11, 35; 718 NW2d 827 (2006). Contrary to what plaintiff argues, a covenant of good faith and fair dealing is not implied into every contract to protect the reasonable expectations of the contracting parties. *Burkhardt v Bailey*, 260 Mich App 636, 656; 680 NW2d 453 (2004). Where an action is permitted by a contract, such as terminating a franchise, there is no contract violation even if the action is undertaken for the purpose of avoiding the contract and thwarting the reasonable expectations of the contracting party. *In re Leix*, ___ Mich App ___, ___ NW2d ___ (Docket No. 291406, issued August 26, 2010), slip op at 10-11. Accordingly, count V was properly dismissed.

V. DISMISSAL WITH PREJUDICE

Plaintiff lastly argues that the trial court erred when it dismissed counts I, III, IV, VII, IX, and X *with prejudice*. We again disagree.

Contrary to what plaintiff argues, a decision granting summary disposition under MCR 2.116(C)(8) is a decision on the merits. As explained in *ABB Paint Finishing, Inc v Nat'l Union Fire Ins Co*, 223 Mich App 559, 563; 567 NW2d 456 (1997):

[I]t is logically inconsistent to grant a motion for summary disposition under C(8) "not upon the merits." That is the equivalent of saying that "without looking at the merit, the complaint is legally without merit." Thus, summary disposition under C(8) is necessarily a decision on the merits. To grant such a motion "without prejudice" is equally incongruous. That is the equivalent of saying that the plaintiff's claim is without legal merit but he may refile the exact same claim. Logically, then, a grant of summary disposition under subrule C(8) should always be with prejudice.

MCR 2.116(I)(5) provides that when the grounds for summary disposition are asserted under (C)(8), the trial court "shall give the parties an opportunity to amend their pleadings . . . unless the evidence then before the court shows the amendment would not be justified." As previously

discussed, plaintiff was given two opportunities to amend its pleading and failed to take advantage of the second opportunity. Under the circumstances, plaintiff's claims were properly dismissed with prejudice.

Affirmed.

/s/ Douglas B. Shapiro
/s/ E. Thomas Fitzgerald
/s/ Stephen L. Borrello